Supreme Court, U.S.
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No. 02-1417

In the Supreme Court of the United States

CREDIT LYONNAIS ROUSE, LTD.,

Petitioner,

v.

OCEAN VIEW CAPITAL, INC., VIACOM, INC., AND EMERSON ELECTRIC CO.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.8, petitioner Credit Lyonnais Rouse, Ltd. ("CLR") submits this Supplemental Brief to bring to the Court's attention a relevant decision released after the petition for a writ of certiorari was filed. The decision is *Metallgesellschaft AG* v. *Sumitomo Corp.*, __ F.3d __, 2003 WL 1665352 (7th Cir. March 31, 2003) (No. 00-3700).

1. The petition explains that, in the decision below, the Seventh Circuit fashioned a new test for antitrust standing that cannot be reconciled with this Court's decision in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977). In place of this Court's doctrine that antitrust standing is confined to those "*direct* purchasers" who entered into transactions *with the alleged conspirators* at artificially inflated prices, the court of appeals decided that any "*first* purchasers" who dealt *with any other suppliers in collateral markets* affected by an alleged conspiracy may sue for treble damages under the Clayton Act. The premise for this ruling is that *Illinois Brick* allows suits both by direct purchasers in the "supply chain" in which the defendants participated and also by participants in a "separate but related * * * market" affected by the alleged conspiracy. Pet. App. 18a.

This decision dramatically expands antitrust standing beyond the limits this Court has established. The court of appeals declared that these plaintiffs may sue to recover treble damages based on their purchases of physical copper, even though they neither purchased physical copper from any of the defendants (including CLR, a futures clearing broker) nor traded futures contracts with or through any of the defendants. The court recognized that, as a result of this approach, alleged antitrust conspirators will face duplicative liability to at least two categories of plaintiffs: (1) the parties who dealt directly with the defendants in buying copper futures at allegedly inflated prices, in transactions from which the defendants supposedly profited, and (2) any purchasers of physical copper

in transactions in which the defendants were not parties and from which they could not have profited. See Pet. App. 18a-21a.

The addition of new categories of potential antitrust plaintiffs who did not deal directly with the alleged conspirators poses all of the problems that the *Illinois Brick* "direct purchaser" rule was designed to prevent. As the petition explained, *Illinois Brick* rests on the sound principle that, in price fixing and price manipulation cases, the appropriate scope of antitrust exposure is defined by the class of purchasers with whom the alleged conspirators dealt directly. Their claims are manageable as a matter of proof. By contrast, claims by indirect or collateral purchasers necessarily involve more speculative and more complex issues of proof of causation and amount of damages.

In addition, the Court concluded in *Illinois Brick* that permitting direct purchasers — but only direct purchasers — to recover treble damages achieves the objectives of the antitrust statutes and simultaneously avoids subjecting businesses to duplicative recoveries. As the Court held, the direct purchasers' right to recover treble damages provides a sufficient amount of deterrence and assures that liability is proportional to the conspirators' unlawful gains.

2. The Seventh Circuit's opinion suggests that the defendants' arguments would shield them from appropriate liability, but this insinuation is false. As the petition explains, *Illinois Brick* leaves ample room for antitrust claims by parties who dealt with the defendants in the allegedly manipulated futures market and thus would fit within *Illinois Brick*'s "direct purchaser" rule.

This exposure is not merely theoretical. In a decision released on March 31, 2003, the Seventh Circuit reinstated antitrust claims by participants in the copper *futures* market who claimed that they were injured by the same conspiracy on which the plaintiffs here base their claims. See *Metall-*

gesellschaft, *supra*. In that case, "short-sellers that bought copper futures contracts from brokers in New York, Connecticut, and London" are claiming that they were injured "by an alleged conspiracy involving Sumitomo and others to raise the price of copper and manipulate the London Metals Exchange (LME)." *Id.*, slip op. at 1.

The district court had dismissed the plaintiffs' claims on several grounds, including lack of antitrust standing. The Seventh Circuit reversed. The court ruled that "the right of these particular plaintiffs * * * who are futures traders" to bring antitrust claims "must be reconsidered in light of our opinion in *Loeb Industries* v. *Sumitomo*" — the opinion that is the subject of the petitions by CLR and its co-defendants. *Id.*, slip op. at 13. The decision reinstating those claims illustrates that there were "direct" participants in the futures market in which CLR participated who have far more plausible claims to antitrust standing under *Illinois Brick* than do the plaintiffs-respondents in the present case.

Moreover, the Seventh Circuit is relying on the approach to antitrust standing adopted in the present case to guide the resolution of other claims, including those brought by direct participants in the futures market. The petition should be granted to reestablish the principle that direct purchasers from the alleged conspirators — but only the direct purchasers from the conspirators — have standing to pursue price fixing and market manipulation claims and that the Seventh Circuit's adoption of the "umbrella standing" concept, under the label "first purchaser," has no place in federal antitrust law.

Respectfully submitted.

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